

Upper Clark Fork River Basin Steering Committee Meeting Summary October 4, 2006

Introductions

Gerald Mueller and members of the Upper Clark Fork River Basin Steering Committee (Steering Committee) introduced themselves. Those in attendance included:

Members	Group/Organization Represented
Nate Hall	Avista
Jim Struna	Granite County
Jim Dinsmore	Granite Conservation District
Doug Martin	Natural Resource Damage Program (NRDP)
Bob Benson	Clark Fork Coalition
Holly Franz	PPL Montana
Jules Waber	Powell County
Guests	
Fay Bergan	Montana Reserved Water Rights Compact Commission
Jody Miller	United States Forest Service (USFS)
Jan Langel	DNRC Helena Water Resources Regional Manager
Staff	
Gerald Mueller	Facilitator

Agenda

- Review of the June 28, 2006 Meeting Summary
- Updates
 - Steering Committee Membership
 - Steering Committee Funding
 - Clark Fork Watershed Roundtable
 - Upper Clark Fork River Flow Story
 - Milltown Water Rights Meeting
- State-USFS Reserved Water Rights Compact and Upper Clark Fork River Basin Closure
- DNRC Working Group Surface and Ground Water Recommendations
- Steering Committee 06-07 Work Plan
- Public Comment
- Next Meeting

June 28, 2006 Meeting Summary

The Steering Committee made no changes to the meeting summary.

Updates

Steering Committee Membership - Gerald Mueller reported that Mike McLane has changed jobs. As of October 1, 2006, he works for the Montana Department of Fish, Wildlife and Parks

(DFWP) as one of two people responsible for water rights, water leasing, and related topics. Mr. McLane may continue to work with the Steering Committee in the future as a representative of DFWP. Also, Mr. Mueller stated that pursuant to the Steering Committee's suggestion, he did meet with Senator Dave Lewis to determine his interest in serving as a Steering Committee member. Senator Lewis, whose district includes much of Powell County, expressed interest. Mr. Mueller, therefore, passed his name to Mary Sexton. Mr. Mueller has not yet heard back from Mary Sexton about this appointment, but he expects a response soon.

Steering Committee Funding - Gerald Mueller reported that Jack Stults, while he was Water Resources Division Administrator, told him that the DNRC budget includes \$20,000 per year for the Steering Committee for the 2007-2008 biennium. While this is good news, the members of the Steering Committee will need to support this budget request during the legislature.

Clark Fork Watershed Roundtable - Although he has left DNRC for DFWP, Mike McLane remains responsible for convening a round table of existing conservation districts and watershed groups in the Clark Fork River basin. Mr. McLane has said that he has arranged for a facilitator for the roundtable, Karen Flipovich who was formerly the director of the Montana Water Course, but that no date for convening the roundtable has been set.

Upper Clark Fork River Flow Story - The document is written. DNRC's Martha Hodder is presently creating the print layout for the document. Mike McLane is also trying to determine whether or not the document must be printed using state printing services. The Watershed Assistance Grant that is funding printing has been extended through the end of this year.

Milltown Water Rights Meeting - Carol Fox asked that a Natural Resources Damage Program Advisory Committee meeting on Tuesday, October 10, 2006 be announced. The meeting will focus on the water rights at Milltown Dam. Mike McLane will discuss water rights in general, and Rob Collins will explain how the Milltown Consent Decree deals with the potential transfer of these rights from NorthWestern Energy to the state. The meeting is scheduled for 1:00 p.m. at the Deer Lodge Community Center.

State-USFS Reserved Water Rights Compact

Using a Power Point presentation, Faye Bergan, legal counsel for the Reserved Water Rights Compact Commission (Compact Commission), and Jody Miller, an attorney in the Office of General Council of the United States Forest Service (USFS) Region 1, summarized the water rights compact negotiated by the Compact Commission and the USFS. See Appendix 1 for the content of the Power Point. An executive summary of the compact is attached below in Appendix 2. The full compact is included in Appendix 3. Ms. Bergan and Miller also passed out a draft revision of 85-2-233 MCA which is necessary to implement portions of the compact. Ms. Bergan stated that a key issue about the status of the compact if a future legislature makes changes to state law in conflict with the compact was resolved by allowing the USFS to withdraw from the compact and file for reserved water rights. Another important change to section 85-2-233 (1)(b) is that the "good cause shown" requirement for holding a hearing on any objection to a temporary preliminary or preliminary decree means "...that a person has an ownership interest in land or water, or its use, that has been affected by the decree." The change is the addition of land that has been affected by the decree. The existing statute limits the effect

to water only. Beginning next week, the Compact Commission and the USFS will conduct a series of meetings or open houses to present the negotiated compact to the public. The schedule of these meetings is included in Appendix 4.

DNRC Working Group Surface and Ground Water Recommendations

Gerald Mueller passed out copies of two documents provided by Mike McLane. The first, see Appendix 5, was the draft recommendations of the Working Group. The Working Group recommendations authorize augmentation as a means of addressing permit applications when ground and surface water are hydrologically connected. Holly Franz, who is a member of the Working Group, noted that all of its members have not agreed to the recommendations. The representatives of the Montana Stockgrowers, the Montana Farm Bureau, and the Builders Association are consulting with their organizations.

The second document was a draft bill prepared by the DNRC amending 85-2-306 to modify the 35 gpm/10 acre-ft/yr ground water well permit exemption, see Appendix 6. The Working Group did not reach agreement regarding this bill. It would preserve the existing 35 gpm/10 acre-ft/yr permit exemption for wells or developed springs for stock water use. It also modifies the exemption, first by limiting it to domestic and commercial uses, second by changing the limit to 35 gpm and 1 acre-ft/yr, and third by restricting lawn and garden use to one-quarter acre of irrigated land. This bill does not change existing definition of a combined appropriation. DNRC's existing rules requires wells to be physically manifolded together before they are considered a combined appropriation. DNRC may alter its rules to change this definition.

Mr. Mueller also passed out copies of two memos addressing implementation of the Bitterroot and Upper Clark Fork Basin closures and the interconnection of ground and surface water. One memo from Bill Schultz to Terri McLaughlin and Kim Overcast asks questions regarding permitting activity in the two closed basins given the Supreme Court decision in TU vs. DNRC. The other memo answers the questions. Copies of these memos are attached as Appendix 7. These memos confirm that both induced infiltration (the "cone of depression" test) and prestream capture of tributary ground water must be assessed in determining whether or not a proposed ground water appropriation would adversely affect surface water flow.

Public Comment

There was no public comment.

Next Meeting

The next meeting is scheduled for November 15, 2006 in the usual location, St. Mary's Center in Deer Lodge.

FOREST SERVICE COMPACT

- Recognizes federal reserved water rights
 - Creates 78 state water rights in Compact
 - Provides process for acquiring state water rights
 - Changes to state law for sequencing and standing
 - New state law for permanent change of diversionary use to instream flow
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Reserved Water Rights

- Discrete Administrative Uses
 - Current
 - Future
 - Dispersed Administrative Uses
 - Emergency Fire Suppression
 - South Fork Flathead Wild & Scenic River
-

State Water Rights Created

- 77 streams with quantified instream flow under state law based on Wetted Perimeter Methodology
 - 1 in situ non-consumptive (Fen) based on volume
 - Water Right created in Compact (akin to Murphy Rights)
-

Process for Acquiring State Water Rights

- Modifications to state water reservation statute, 85-2-316
 - Authorizes Forest Service to proceed under 85-2-316 in all basins notwithstanding basin closure.
 - Authorizes Forest Service to apply for any authorized federal purpose
 - Sets time frames
-

State Water Reservations

- New Compact provisions for specific procedures in limited circumstances
 - Where purpose is fish
 - Where amount requested is based on the Wetted Perimeter Methodology

- Lower inflection point
- Upper inflection point for an existing population of certain fish species

State Water Reservation (Cont.)

- New Compact provisions for specific procedures in limited circumstances (Cont.)

- DNRC has no discretion unless there is objector
- Object has the burden to show various criteria

Sequencing

- Permit applicant must have special use permit in order to have correct and complete application
 - All appropriations must have special use permit in order to get certificate of water right
 - New permits are subject to terms and conditions of special use permit
-

Standing

- Changes to 85-2-233 will confirm that Forest Service has standing to object in the state-wide water adjudication.
- Language was taken from previous Water Court Rules

New state law for permanent change of diversionary use to instream flow

- Ability to change diversionary (consumptive) use to instream flow on permanent basis within or immediately adjacent to the exterior boundaries of the National Forest
 - Requires new provision of state law
 - Must go through change process with notice and opportunity to object
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Advantages

- Avoids costly and time-consuming litigation
 - Provides certainty
 - Structures administration and enforcement
 - Focus is on resource needs and tool to meet those needs
 - Fosters cooperation
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Appendix 2

Executive Summary of the USFS Compact

Appendix 3
USFS Compact

Appendix 4
Scheduled Meetings and Open Houses for USDA Forest Service/Montana
RWRCC Agreement

October 10

Libby – Open House 1:00 - 3:00 p.m. City Hall–Ponderosa Room, 952 E. Spruce St
Kalispell – Meeting 7:00 – 9:00 p.m. Red Lion Kalispell Center

October 11

Seeley Lake – Open House 1:00 - 3:00 p.m. Seeley Lake Ranger Station
Missoula – Meeting 7:00 – 9:00 p.m. Doubletree Hotel – 100 Madison Street

October 12

Hamilton – Open House 10:00 a.m. - 12:00 p.m. City Hall Community Room, 223 So. 2 nd St .
Philipsburg – Open House 4:00 – 6:00 p.m. 212 E. Broadway (next to the Post Office)

October 13

Thompson Falls – Open House 10:30 a.m. to 12:30 p.m. – Thompson Falls Senior Center , 1191 Mt. Silcox Dr .

October 16

Lincoln – Open House 1:00 – 3:00 p.m. Lincoln Community Hall
Great Falls – Meeting 7:00 – 9:00 p.m. City Commission Chambers, Mansfield Center for the Performing Arts, Park Dr.

October 17

Stanford – Open House 9:00 – 11:00 a.m. City Hall
White Sulphur Springs – Open House 2:00 – 4:00 p.m. Bank of the Rockies, 205 West Main
Helena – Meeting 7:00 – 9:00 p.m. MACo Building , 2715 Skyway Drive

October 18

Ennis – Open House 1:00 – 3:00 p.m. Ennis School , Main St .
Bozeman – Meeting 7:00 – 9:00 p.m. Museum of the Rockies – Hager Auditorium – 600 W. Kagy

October 19

Dillon – Open House 1:00 – 3:00 p.m. UM-Western, Lewis & Clark Room (in Matthews Hall)
Butte – Meeting 7:00 – 9:00 p.m. Red Lion Inn, 2100 Cornell

October 30

Billings – Meeting 7:00 – 9:00 p.m. Holiday Inn Grand MT – 5500 Midland Rd.

Appendix 5
Surface Water / Ground Water Work Group
Recommendations for Statutory Change
Augmentation, Ground Water Analysis & Basin Closure Amendments
Draft May 3, 2006

85-2-102 New Definition: “Augmentation Plan” means an arrangement, either temporary or permanent, to make water available for a new beneficial use in a water source or tributary through the development of a new or alternative water supply or a change of an existing water right that reasonably replaces, in the reach affected, the amount of water that will be consumed by the new proposed use.

New Section: "Municipality" means any incorporated city or town in the state organized and incorporated under Title 7 chapter 2 Montana Code Annotated.

New Section: “Stock water” means the use of water to provide drinking water for livestock which includes, but is not limited to, cattle, sheep, swine, goats, horses, mules, asses, llamas, alpacas, bison, ostriches, rheas, emus, and domestic ungulates.

85-2-102. (Temporary) Definitions. Unless the context requires otherwise, in this chapter, the following definitions apply:

- (1) "Appropriate" means:
 - (a) to divert, impound, or withdraw, including by stock for stock water, a quantity of water for a beneficial use;
 - (b) in the case of a public agency, to reserve water in accordance with 85-2-316;
 - (c) in the case of the department of fish, wildlife, and parks, to lease water in accordance with 85-2-436; or
 - (d) temporary changes or leases for instream flow to maintain or enhance instream flow to benefit the fishery resource in accordance with 85-2-408.
- (2) "Beneficial use", unless otherwise provided, means:
 - (a) a use of water for the benefit of the appropriator, other persons, or the public, including but not limited to agricultural (including stock water), domestic, fish and wildlife, industrial, irrigation, mining, municipal, power, and recreational uses;
 - (b) a use of water appropriated by the department for the state water leasing program under 85-2-141 and of water leased under a valid lease issued by the department under 85-2-141;
 - (c) a use of water by the department of fish, wildlife, and parks pursuant to a lease authorized under 85-2-436; ~~or~~
 - (d) a use of water through a temporary change in appropriation right or lease to enhance instream flow to benefit the fishery resource in accordance with 85-2-408, or
 - (e) a use of water for augmentation.

85-2-329. Definitions. Unless the context requires otherwise, in 85-2-330 and this section, the following definitions apply:

- (1) "Application" means an application for a beneficial water use permit pursuant to 85-2-302 or a state water reservation pursuant to 85-2-316.

~~(2) "Ground water" means water that is beneath the land surface or beneath the bed of a stream, lake, reservoir, or other body of surface water and that is not immediately or directly connected to surface water.~~

(3) "Nonconsumptive use" means a beneficial use of water that does not cause a reduction in the source of supply and in which substantially all of the water returns without delay to the source of supply, causing little or no disruption in stream conditions.

(4) "Teton River basin" means the drainage area of the Teton River and its tributaries above the confluence of the Teton and Marias Rivers.

85-2-330. Basin closure -- exceptions. (1) As provided in 85-2-319 and subject to the provisions of subsection (2) of this section, the department may not process or grant an application for a permit to appropriate water or for a reservation to reserve water within the Teton River basin.

(2) The provisions of subsection (1) do not apply to:

(a) an application for a permit to appropriate ground water when the application is accompanied by the report and augmentation plan as required by 85-2-337;

(b) an application for a permit to appropriate surface water for a nonconsumptive hydropower use;

(c) an application for a permit to appropriate surface water for ~~domestic, municipal~~ municipalities or stock use;

(d) an application to store water during high spring flows in an impoundment with a capacity of 50 acre-feet or more; or

(e) emergency temporary appropriations as provided for in 85-2-113 (3) .

(f) An application for a permit to appropriate surface water to conduct response actions related to natural resource restoration required as

i) remedial actions pursuant to the federal Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended,

ii) Aquatic Resources mitigation activities done in compliance with and as required by Federal Clean Water Act of 1977 (33 USC 1251-1376), or

iii) remedial actions taken pursuant to Title 75, chapter 10, part 7 under Montana law.
A permit issued to conduct mitigation or remedial actions may not be used for dilution.

(3) A change of use authorization for changing the purpose of use may not be issued for any permit issued pursuant to subsections 2 b, c, e and f.

85-2-335. Definitions. Unless the context requires otherwise, in 85-2-335 through 85-2-338, the following definitions apply:

(1) "Application" means an application for a beneficial water use permit pursuant to 85-2-302.

(2) "Upper Clark Fork River basin" means the drainage area of the Clark Fork River and its tributaries above Milltown dam.

85-2-336. Basin closure -- exception. (1) As provided in 85-2-319 and subject to the provisions of subsection (2) of this section, the department may not process or grant an application for a permit to appropriate water within the Upper Clark Fork River basin.

(2) The provisions of subsection (1) do not apply to:

(a) an application for a permit to appropriate ground water when the application is

accompanied by the report and augmentation plan as required by 85-2-337;

(b) an application filed prior to January 1, 2000, for a permit to appropriate surface water to conduct response actions or remedial actions pursuant to the federal Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended, or Title 75, chapter 10, part 7, at sites designated as of January 1, 1994. The total flow rates for all permits issued under this subsection (2)(b) may not exceed 10 cubic feet per second. A permit issued to conduct response actions or remedial actions may not be used for dilution and must be limited to a term not to exceed the necessary time to complete the response or remedial action, and the permit may not be transferred to any person for any purpose other than the designated response or remedial action.

(c) an application for a permit to appropriate surface water to conduct aquatic resources mitigation activities done in compliance with and as required by Federal Clean Water Act of 1977 (33 USC 1251-1376). A permit issued to conduct mitigation actions may not be used for dilution.

(e d) an application for a permit to appropriate surface water for stock use;

(d e) an application to store water during high spring flows in an impoundment with a capacity of 50 acre-feet or more; or

(e f) an application for power generation at existing hydroelectric dams. The department may not approve a permit for power generation if approval results in additional consumption of water.

(3) A change of use authorization for changing the purpose of use may not be issued for any permit issued pursuant to subsections 2 b, c, d, and f.

(3) Applications for state water reservations in the Upper Clark Fork River basin filed pursuant to 85-2-316 and pending as of May 1, 1991, have a priority date of May 1, 1991. The filing of a state water reservation application does not provide standing to object under 85-2-402.

(4) The department may not process or approve applications for state water reservations in the Upper Clark Fork River basin filed pursuant to 85-2-316.

85-2-337. Ground water permit applications -- report required. (1) During the period of basin closure provided in 85-2-330, 85-2-336(1), 85-2-340, 85-2-342, 85-2-344, or any administratively closed basin pursuant to 85-2-319, an applicant for a ground water permit in ~~the Upper Clark Fork River~~ a closed basin shall submit a report prepared by a ~~professional engineer or hydrologist~~ person educated and experienced in ground water science, addressing that analyzes the ~~hydrologic~~ hydraulic connection between the source of the ground water and surface water and that quantifies depletions to surface water that result from the proposed appropriation. If the applicant fails to submit the report required in this section, the application is considered defective and must be processed pursuant to 85-2-301.

~~(2) Except as provided in subsection (3), the department may not issue a permit to appropriate ground water in the Upper Clark Fork River basin unless the applicant proves by a preponderance of evidence, in addition to the criteria of 85-2-311, that the source of the ground water is not a part of or substantially or directly connected to surface water.~~

~~(3 2)~~ The department may issue a permit to appropriate ground water if the application includes an augmentation plan and if the applicant proves by a preponderance of evidence, in addition to the criteria of 85-2-311, that the augmentation plan provides for sufficient augmentation water **to reasonably replace, in the reach affected, the amount of water that will be consumed by the proposed new use.**

(3) Where an augmentation plan requires an “Application for Change of Appropriation Right” under 85-2-402, that change application will be submitted with the “Application for Beneficial Water Use Permit” and its attached hydrologic report and augmentation plan. These applications will be evaluated in a combined proceeding.

85-2-339. Terminated. Sec. 6, Ch. 281, L. 1999.

85-2-340. Definitions. Unless the context requires otherwise, in 85-2-341 and this section, the following definitions apply:

(1) "Application" means an application for a beneficial water use permit pursuant to 85-2-302 or a state water reservation pursuant to 85-2-316.

~~(2) "Ground water" means water that is beneath the land surface or beneath the bed of a stream, lake, reservoir, or other body of surface water and that is not immediately or directly connected to surface water.~~

(3) "Jefferson River basin" means the drainage area of the Jefferson River and its tributaries above the confluence of the Jefferson and Missouri Rivers.

(4) "Madison River basin" means the drainage area of the Madison River and its tributaries above the confluence of the Madison and Jefferson Rivers.

(5) "Nonconsumptive use" means a beneficial use of water that does not cause a reduction in the source of supply and in which substantially all of the water returns without delay to the source of supply, causing little or no disruption in stream conditions.

85-2-341. Basin closure -- exceptions. (1) As provided in 85-2-319 and subject to the provisions of subsection (2) of this section, the department may not process or grant an application for a permit to appropriate water or for a state water reservation to reserve water within the Jefferson River basin or Madison River basin.

(2) The provisions of subsection (1) do not apply to:

(a) an application for a permit to appropriate ground water when the application is accompanied by the report and augmentation plan as required by 85-2-337;

(b) an application for a permit to appropriate surface water for a nonconsumptive hydropower use;

(c) an application for a permit to appropriate surface water for ~~domestic, municipal,~~ municipalities or stock use;

(d) an application to store water during high spring flows in an impoundment with a capacity of 50 acre-feet or more; or

(e) temporary emergency appropriations as provided for in 85-2-113(3).

(f) An application for a permit to appropriate surface water to conduct response actions related to natural resource restoration required as

i) remedial actions pursuant to the federal Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended,

ii) Aquatic Resources mitigation activities done in compliance with and as required by Federal Clean Water Act of 1977 (33 USC 1251-1376), or

iii) remedial actions taken pursuant to Title 75, chapter 10, part 7 under Montana law.

A permit issued to conduct mitigation or remedial actions may not be used for dilution.

(3) A change of use authorization for changing the purpose of use may not be issued for any permit issued pursuant to subsections 2 b, c, e, and f.

85-2-342. Definitions. Unless the context requires otherwise, in 85-2-343 and this section, the following definitions apply:

(1) "Application" means an application for a beneficial water use permit pursuant to 85-2-302 or a state water reservation pursuant to 85-2-316.

~~(2) "Ground water" means water that is beneath the land surface or beneath the bed of a stream, lake, reservoir, or other body of surface water and that is not immediately or directly connected to surface water.~~

(3) "Nonconsumptive use" means a beneficial use of water that does not cause a reduction in the source of supply and in which substantially all of the water returns without delay to the source of supply, causing little or no disruption in stream conditions.

(4) "Upper Missouri River basin" means the drainage area of the Missouri River and its tributaries above Morony dam.

85-2-343. Basin closure -- exceptions. (1) As provided in 85-2-319 and subject to the provisions of subsection (2) of this section, the department may not process or grant an application for a permit to appropriate water or for a reservation to reserve water within the upper Missouri River basin until the final decrees have been issued in accordance with part 2 of this chapter for all of the subbasins of the upper Missouri River basin.

(2) The provisions of subsection (1) do not apply to:

(a) an application for a permit to appropriate ground water when the application is accompanied by the report and augmentation plan as required by 85-2-337;

(b) an application for a permit to appropriate surface water for a nonconsumptive hydropower use;

(c) an application for a permit to appropriate surface water for ~~domestic, municipal~~ municipalities or stock use;

(d) an application to store water during high spring flows in an impoundment with a capacity of 50 acre-feet or more;

(e) an application for a permit to use water from the Muddy Creek drainage, which drains to the Sun River, if the proposed use of water will help control erosion in the Muddy Creek drainage; or

(f) temporary emergency appropriations as provided for in 85-2-113 (3).

(g) An application for a permit to appropriate surface water to conduct response actions related to natural resource restoration required as

i) remedial actions pursuant to the federal Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended,

ii) Aquatic Resources mitigation activities done in compliance with and as required by Federal Clean Water Act of 1977 (33 USC 1251-1376), or

iii) remedial actions taken pursuant to Title 75, chapter 10, part 7 under Montana law.

A permit issued to conduct mitigation or remedial actions may not be used for dilution.

(3) A change of use authorization for changing the purpose of use may not be issued for any permit issued pursuant to subsections 2 b, c, d, e, f, and g.

85-2-344. Bitterroot River subbasin temporary closure -- definitions -- exceptions. (1)

Unless the context requires otherwise, in this section, the following definitions apply:

(a) "Application" means an application for a beneficial water use permit pursuant to 85-2-302 or a state water reservation pursuant to 85-2-316.

(b) "Bitterroot River basin" means the drainage area of the Bitterroot River and its tributaries above the confluence of the Bitterroot River and Clark Fork of the Columbia River and designated as "Basin 76H".

(c) "Bitterroot River subbasin" means one of the following hydrologically related portions of the Bitterroot River basin:

- (i) the mainstem subbasin, designated as "Subbasin 76HA";
- (ii) the north end subbasin, designated as "Subbasin 76HB";
- (iii) the east side subbasin, designated as "Subbasin 76HC";
- (iv) the southeast subbasin, designated as "Subbasin 76HD";
- (v) the south end subbasin, designated as "Subbasin 76HE";
- (vi) the southwest subbasin, designated as "Subbasin 76HF";
- (vii) the west central subbasin, designated as "Subbasin 76HG"; or
- (viii) the northwest subbasin, designated as "Subbasin 76HH".

(2) As provided in 85-2-319, the department may not process or grant an application for a permit to appropriate water or for a state water reservation within a Bitterroot River subbasin until the closure for the basin is terminated pursuant to subsection (3) of this section, except for:

(a) an application for a permit to appropriate ground water when the application is accompanied by the report and augmentation plan as required by 85-2-337;

(b) an application for a permit to appropriate surface water for a ~~municipal~~ a municipality's water supply;

(c) temporary emergency appropriations pursuant to 85-2-113 (3); or

(d) an application to store water during high spring flow in an impoundment with a capacity of 50 acre-feet or more.

(e) An application for a permit to appropriate surface water to conduct response actions related to natural resource restoration required as

i) remedial actions pursuant to the federal Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended,

ii) Aquatic Resources mitigation activities done in compliance with and as required by Federal Clean Water Act of 1977 (33 USC 1251-1376), or

iii) remedial actions taken pursuant to Title 75, chapter 10, part 7 under Montana law.

A permit issued to conduct mitigation or remedial actions may not be used for dilution.

(3) Each Bitterroot River subbasin is closed to new appropriations and new state water reservations until 2 years after all water rights in the subbasin arising under the laws of the state are subject to an enforceable and administrable decree as provided in 85-2-406 (4).

(5) A change of use authorization for changing the purpose of use may not be issued for any permit issued pursuant to subsections 2 b, c, and e.

Appendix 6
*** Bill No. *** 5706-24-002F

Introduced By *****

By Request of the Department of Natural Resources and Conservation

A Bill for an Act entitled: “An Act revising the ground water exemption from permitting; providing rulemaking authority; amending section 85-2-306, MCA; and providing an immediate effective date.”

Be it enacted by the Legislature of the State of Montana:

Section 1. Section 85-2-306, MCA, is amended to read:

" 85-2-306. Exceptions to permit requirements. (1) Ground water may be appropriated only by a person who has a possessory interest in the property where the water is to be put to beneficial use and exclusive property rights in the ground water development works or, if another person has rights in the ground water development works, with the written consent of the person with those property rights. If the person does not have a possessory interest in the real property from which the ground water may be appropriated, the person shall provide to the owner of the real property written notification of the works and the person's intent to appropriate ground water from the works. The written notification must be provided to the landowner at least 30 days prior to constructing any associated works or, if no new or expanded works are proposed, 30 days prior to appropriating the water. The written notification under this subsection is a notice requirement only and does not create an easement in or over the real property where the ground water development works are located.

(2) Inside the boundaries of a controlled ground water area, ground water may be appropriated only:

(a) according to a permit received pursuant to 85-2-508; or

(b) according to the requirements of an order issued pursuant to 85-2-507.

(3) (a) Outside the boundaries of a controlled ground water area, a permit is not required before appropriating: (i) ground water by means of a well or developed spring for stockwater use on a parcel of land that is owned or under the control of the applicant and that is 40 acres or larger with a maximum appropriation of 35 gallons a minute or less, not to exceed 10 acre-feet a year, except that a or

(ii) ground water by means of a well for domestic use or commercial use with a maximum appropriation of 35 gallons a minute or less, not to exceed 1 acre-feet a year. Lawn and garden uses associated with a domestic use or commercial use cannot exceed one-quarter acre of irrigated land.

(b) A combined appropriation from the same source from two or more wells or developed springs occurring under either subsection 3(a)(i) or 3(a)(ii) exceeding the respective limitation of that subsection ~~limitation this limitation~~ requires a permit.

~~(b)~~ (c)(i) Within 60 days of completion of the well or developed spring and appropriation of the ground water for beneficial use, the appropriator shall file a notice of completion with the department on a form provided by the department through its offices.

(ii) Upon receipt of the notice, the department shall review the notice and may, before issuing a certificate of water right, return a defective notice for correction or completion, together with the reasons for returning it. A notice does not lose priority of filing because of defects if the notice is corrected, completed, and refiled with the department within 30 days of notification of defects or within a further time as the department may allow, not to exceed 6 months.

(iii) If a notice is not corrected and completed within the time allowed, the priority date of appropriation is the date of refileing a correct and complete notice with the department.

~~(e)~~ (d) A certificate of water right may not be issued until a correct and complete notice has been filed with the department, including proof of landowner notification as necessary under subsection (1). The original of the certificate must be sent to the appropriator. The department shall keep a copy of the certificate in its office in Helena. The date of filing of the notice of completion is the date of priority of the right.

(4) An appropriator of ground water by means of a well or developed spring first put to beneficial use between January 1, 1962, and July 1, 1973, who did not file a notice of completion, as required by laws in force prior to April 14, 1981, with the county clerk and recorder shall file a notice of completion, as provided in subsection (3), with the department to perfect the water right. The filing of a claim pursuant to 85-2-221 is sufficient notice of completion under this subsection. The priority date of the appropriation is the date of the filing of a notice, as provided in subsection (3), or the date of the filing of the claim of existing water right.

(5) An appropriation under subsection (4) is an existing right, and a permit is not required. However, the department shall acknowledge the receipt of a correct and complete filing of a notice of completion, except that for an appropriation of 35 gallons a minute or less, not to exceed 10 acre-feet a year, the department shall issue a certificate of water right. If a certificate is issued under this section, a certificate need not be issued under the adjudication proceedings provided for in 85-2-236.

(6) A permit is not required before constructing an impoundment or pit and appropriating water for use by livestock if:

(a) the maximum capacity of the impoundment or pit is less than 15 acre-feet;

(b) the appropriation is less than 30 acre-feet a year;

(c) the appropriation is from a source other than a perennial flowing stream; and

(d) the impoundment or pit is to be constructed on and will be accessible to a parcel of land that is owned or under the control of the applicant and that is 40 acres or larger.

(7) Within 60 days after constructing an impoundment or pit, the appropriator shall apply for a permit as prescribed by this part. Upon receipt of a correct and complete application for a stockwater provisional permit, the department shall automatically issue a provisional permit. If the department determines after a hearing that the rights of other appropriators have been or will be adversely affected, it may revoke the permit or require the permittee to modify the impoundment or pit and may then make the permit subject to terms, conditions, restrictions, or limitations that it considers necessary to protect the rights of other appropriators.

(8) ~~A person may also appropriate water without applying for or prior to receiving a permit under rules adopted by the department under 85-2-113."~~

{Internal References to 85-2-306:

85-2-102*	85-2-102*	85-2-113x	85-2-236x
85-2-302x	85-2-322x	85-2-401x	85-20-601x
85-20-901x	85-20-901x	85-20-901x	85-20-901x
85-20-901x	85-20-901x	85-20-901x	85-20-901x
85-20-901x	85-20-901x	85-20-901x	85-20-901x
85-20-901x	85-20-901x	85-20-901x	85-20-901x
85-20-901x	85-20-901x	85-20-901x	85-20-901x
85-20-901x	85-20-901x	85-20-901x	85-20-901x
85-20-901x }			

NEW SECTION. Section 2. Rulemaking. The department may adopt rules to implement [section 1].

NEW SECTION. Section 3. {standard} Saving clause. [This act] does not affect rights and duties that matured, penalties that were incurred, or proceedings that were begun before [the effective date of this act].

_____NEW SECTION. **Section 4. {standard} Effective date.** [This act] is effective on passage and approval.

-END-

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Appendix 7

June 26, 2006

To: Missoula Regional Office, New Appropriations Program

From: Bill Schultz, Regional Manager

Subject: Implementation of Bitterroot and Upper Clark Fork Basin Closures & Surface Water /Ground Water Connection

Background: On June 16, 2006, a conference call was held to discuss the issues and questions raised in Bill Schultz's June 2, 2006 memorandum to Terri McLaughlin and Kim Overcast (copy attached). The memorandum was in regards to **implementation of the Bitterroot and Upper Clark Fork Basin closures** and the issue of surface and groundwater connection as it applies to processing permit applications. In attendance were Tim Hall, Kurt Hafferman, Terri McLaughlin, Kim Overcast, Bill Schultz and Jim Nave.

Tim Hall started discussion by clarifying that the **difference between the Upper Missouri River Basin closures and the Upper Clark Fork and Bitterroot closures** is that in the Upper Missouri River closure the applicant must demonstrate that the groundwater to be appropriated is not immediately or directly connected to any source of surface water prior to DNRC's being able to process the application. In the Upper Clark Fork and Bitterroot Closures, DNRC can accept and process an application prior to determining if there is a groundwater/surface water connection. The main difference between DNRC's processing applications in the Upper Clark Fork and Bitterroot River Basins is that a report addressing the connectivity of groundwater to surface water must be submitted with a groundwater application in the Upper Clark Fork Basin.

Bill Schultz brought up the point that the new appropriation rules regarding Basin Closure Area Exceptions and Compliance found in 36.12.120 ARM may at times conflict with the statutory requirements of the Upper Clark Fork and Bitterroot River Basins. Tim Hall's response was that **if there is a conflict between the new appropriation rules and the statutes, the statute prevails.**

Bill Schultz's June 2, 2006, memorandum raised four questions regarding the issues with groundwater/surface water connectivity as it applies to processing permit applications in the Bitterroot and Upper Clark Fork closure areas. Tim Hall's response to the first and second questions is that DNRC can and should consider whether or not a proposed groundwater appropriation will adversely impact surface water flows when processing an application. **In the Bitterroot River Basin, if it is found that pumping a well reduces surface water flow** then there is a high probability that the applicant cannot meet the criteria for issuance found in Mont. Code Ann. § 85-2-311. This is not to say that DNRC cannot process the permit through public notice. However, **for the application to be issued, the applicant must address impacts to existing senior surface water users.** Therefore, groundwater applications in the Bitterroot River must address groundwater/surface water connectivity to adequately address adverse impact criteria. In the Upper Clark Fork River Basin Closure, the applicant must address groundwater/surface water connectivity per statutory requirements described in 85-2-337. If groundwater is a part of or substantially or directly connected to surface water the DNRC may not issue the permit unless the augmentation requirements of subsection (3) are met.

To answer the third question raised in the June 2, 2006 memorandum, **if an application is shown to adversely impact surface water in the Bitterroot River Basin, the applicant can mitigate the impacts by augmentation.** The amount of augmentation water must mitigate the adverse affect, but not necessarily the total water depletion (but they may often be the same thing). In the Upper Clark Fork

River Basin, the applicant must augment the total water depletion. Subsection 2 and 3 of Mont. Code Ann. § 85-2-337 allow for augmentation.

The final question raised in Bill Schultz's June 2, 2006 memorandum was **what is considered a municipal use as it applies to basin closure exceptions**. The “municipal use” definition at 36.12.101(39) has been withdrawn and a new definition has not been adopted. **If the use is solely for homes, with no other uses such as commercial, then the use is to be considered multiple domestic**. For other proposed uses that involve a combination of domestic and commercial or other uses consult the central office on a case-by-case basis to determine if the proposed use and applicant qualifies as municipal.

The memo above is in response to the issues raised in the June 2 memo below:

June 2, 2006

To: Terri McLaughlin, Chief, Water Rights Bureau
Kim Overcast, Manager, New Appropriations Program

From: Bill Schultz, Manager, Missoula Regional Office

Subject: Bitterroot Closure & Surface/Groundwater Connection

During the discussion regarding the Smith River Supreme Court decision at the Regional Managers meeting on May 18 I raised questions regarding the Bitterroot closure. Kim and Tim Hall agreed that the questions warranted further thought and discussion. Kim stated that she would “set something up” (a meeting?). The purpose of this memo is to define the issues and questions, stimulate the discussion, and hopefully get some answers. There are several groundwater applications pending and more major subdivisions with community water systems that will be submitting their water right applications soon.

In Tim Hall’s May 4, 2006 memo to Mary Sexton regarding “TU Supreme Court Case Implementation”, under relationship to the Bitterroot Closure, the memo states “Cases would continue to be decided as they normally would be on the “311” criteria (adverse effect).” This **raises the following questions concerning groundwater applications in the Bitterroot Closure:**

- For a new groundwater application for a municipal supply (an exception in the Bitterroot Closure) where the aquifer test and analysis indicates that the proposed well will **result in induced streambed infiltration** -- will this be considered grounds for not meeting the legal availability and adverse effect criteria? If the aquifer test indicates that the proposed well will **result in prestream capture of tributary groundwater**, will this be considered grounds for not meeting legal availability and adverse impact criteria?
- For a new groundwater application that is not for a municipal supply, but otherwise the same scenario as above, are the answers the same?
- **If the response to either of the previous two bullets is yes, is augmentation allowable to mitigate adverse effects, physical, and legal availability criteria in the Bitterroot?**
- Is a community water system serving a proposed subdivision considered a “municipal use” and therefore meets the exception listed in the Bitterroot Closure? What is the current definition of “municipal” as it is used in closure exceptions?

Your response is appreciated.